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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the May 8. 1987
Assessment by the Minnesota
Insurance Guaranty Association.

ORDER-DENYING MOTION IN IIMINE

By a written motion dated and served on October 13, 1987 the Minnesota Insurance Guaranty Association (MIGA) moved to preclude the testimony of proposed witness, Nelson Maurice. On October 19, 1987, the Minnesota Department of Commerce filed a letter joining in the motion by MIGA. On October 19, 1987, Empire Fire and Marine Insurance Company filed its memorandum in opposition to the motion.

Michael J. Ahern, Esq. of the firm of Moss & Barnett, 1200 Pillsbury Center, Minneapolis, Minnesota 55402, represented MIGA on the motion. The Minnesota Department of Commerce was represented by Jerome L. Getz, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota 55155. Empire Fire and Marine Insurance Company was represented by James A. Neal of the firm of Steffen & Munstenteiger, P.A., 301 Anoka Professional Building, 403 Jackson Street, Anoka, Minnesota 55303.

All parties were advised orally of the contents of this order on October 22, 1987.

Based upon the memoranda filed by the above parties, and all of the filings in this case, and for the reasons set out in the memorandum which follows,

IT IS HEREBY ORDERED: that the Motion in Limine filed by MIGA is hereby DENIED.

Dated: October 26 1987.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Empire Fire and Marine Insurance Company ("Empire " ) proposes to call Nelson Maurice, a former employee of the federal Department of Agriculture, as
a witness in this case. The Association has offered four arguments in support
of its motion to preclude or limit the testimony of Nelson Maurice in this

contested case proceeding. It first suggests that there are no material facts
at issue in this proceeding and that therefore any testimony is irrelevant

under Rule 401 of the Rules of Evidence and Minn. Rule 1400.73,00, subp. 1 . Empire states that Mr. Maurice, who drafted the 1985 revision of the standard re-insurance agreement used by the Federal Crop Insurance Corporation (FCIC) will offer testimony as to why certain provisions of that agreement were deleted and as to why certain new language appears. This testimony is alleged to be relevant to the issue of whether or not the FCIC would in all cases pay off policy obligations directly. It is generally held that Summary judgment is not appropriate where it is desirable or necessary to inquire into facts which might clarify the application of the law. Donney v. Boulware, 144 N.W.2d 711, 716 (Minn. 1966). In this case it appears that the proposed testimony may be of help in clarifying how the law is to be applied in this case. Additionally, the evidence is relevant in that it may permit an inference to be drawn that will justify a desired finding of fact. Boland v. Morrill, 270 Minn. 86, 98, 132 N.W.2d 711, 719 (1965).

MIGA also asserts that the parol evidence precludes testimony as to the interpretation of the re-insurance agreement since it is clear- and unambiguous and therefore speaks for itself . The parol evidence rule provides that the terms of a written contract cannot be varied by evidence of a prior or contemporaneous oral agreement. Housing and Redevelopment Authority v. First Ave. Realty Co._, 133 N.W.2d 645, 648-9 (Minn. 1965). Where proffered evidence suggests that the signers of a contract agreed in writing to one thing, but meant another, it should be excluded based upon the parol evidence rule. Klawitter v. Straumann, 255 N.W.2d 407 (Minn. 1977). In this case the expected testimony apparently does not contradict the terms of the agreement but rather seeks to explain why certain terms either appear or- do not appear. Additionally, it is usually held that the surrounding circumstances that resulted in a writing are admissible to aid in its interpretation, Clark v. Crossroads Center I nc., 285 Minn. 173, 172 N.W.2d 560 (Minn. 1969). and parol evidence is admissible to show the object or purpose of the instrument. Noreen v. Park Construction Co. , 255 Minn. 187, 96 N.W.2d 33 (Minn. 1955). Also, as Empire points out, parol evidence is admissible to aid in

interpreting the writing if it is ambiguous, Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981), or incomplete. Weyerhauser Co. v. Hvidsten, 268 Minn. 448, 129 N.W.2d 772 (Minn. 1964); Flynn v. Sawyer, 272 N.W.2d 904, 908 (Minn. 1978). Since Empire claims the agreement is either ambiguous or incomplete, it should be allowed to present the testimony of Mr. Maurice.

It is also suggested by the Association that Mr. Maurice's testimony would be incompetent since he cannot express any 'intent' on behalf of the FCIC. Empire states that Mr. Maurice served as assistant to the chief executive officer of the FCIC in a policy advisory capacity and was responsible for drafting the revision of the standard re-insurance agreement. Empire points out that Mr. Maurice has personal knowledge concerning the drafting of the contract which will be the subject of his testimony. He would therefore at least be competent to testify concerning his own responsibilities.

Finally, MIGA asserts that any evidence which Mr. Maurice could produce, even if deemed to be relevant, is substantially outweighed by the danger of unfair prejudice, within the meaning of Minnesota Rules of Evidence Rule 403, because MIGA is unable to obtain testimony from current FCIC officials in this contested case proceeding. The fact that MIGA cannot obtain a particular witness does not establish unfair prejudice. Furthermore, unfair prejudice is commonly linked to a jury trial, a situation not present in this case. At any rate, it cannot be concluded that any prejudice to the Association would substantially outweigh the possible probative value of the witness' testimony in this case.

It appears that most of the concerns raised by the Association, including its concern that the proposed witness, current employment may affect his testimony, can be handled as a matter of cross-examination. Likewise, the cross-examination may be employed by the Association to test whether Mr. Maurice's testimony represents his own opinion or the "intent" of the agency for which he worked. The motion in limine is therefore denied.

G.A.B.